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Supreme Court of the United States

OCTOBER TERM, 1970

~~NO. 1682~~ 70-148

WENDELL N. DeBOSE,

Petitioner,

versus

THE M/S LOPPERSUM, etc., et al,

Respondents,

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

DEUTSCH, KERRIGAN & STILES
CORNELIUS G. VAN DALEN
1700 Hibernia Bank Bldg.,
New Orleans, La. 70112
Attorney for Respondent

CHRISTOPHER TOMPKINS
and
BERT M. CASS, JR.
OF COUNSEL

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	1
Statement	2
Argument	2
Conclusion	4

CITATIONS

Mitchell v. Trawler Racer, Inc., 362 US 539 (1960)	3
Waldron v. Moore-McCormack Lines, Inc., 386 US 724 (1967)	3
Usner v. Luckenback, 397 US 933 (1971)	3
United States v. Johnston, 268 US 220 (1925)	4

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Brief In Opposition To Petition For Certiorari

OPINION BELOW

The findings of fact and conclusions of law of the District Court may be found in Appendix B of the petition. The opinion of the Court of Appeals for the Fifth Circuit is reported at 438 F2d 643.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

Whether the evidence warranted finding that respondent's vessel, in particular the stow of lumber, was unseaworthy.

STATEMENT

This litigation concerns the familiar contest between longshoreman and shipowner resulting from personal injury received in the course of stevedore operation aboard a vessel. Petitioner, having had his day in court, and, having lost, appealed to the Fifth Circuit Court of Appeals, which affirmed the findings and conclusions of the District Court in a *per curiam* decision. Briefly, the District Court found that petitioner was the author of his misfortune; and, that his loss was not occasioned by any unseaworthiness of respondent's vessel.

ARGUMENT

The issue in this case deals with factual analysis and no amount of strained semantics can convert it into one warranting review by this court on certiorari. The overriding inaccuracy, which pervades the entirety of petitioner's brief, is the inaccurate assumption that the stow was unseaworthy. The basis for a finding of unseaworthiness, petitioner says, is the foreman's testimony (Petition, p. 2 ftn. 1) that the longshoremen did not slide the bundle into position on the first try.

I

THE DECISION BELOW IS CLEARLY CORRECT

The foreman guessed and suggested possibilities as to why the load did not glide into place. However, the District Court concluded, that from his position on the weather deck, the foreman was unable to view the actions of the longshoremen in the hold (Amendment to Findings

of Fact and Conclusions of Law, App. p. 45).* But even if the load had rubbed against something, this in itself would not constitute unseaworthiness as a matter of law. It is within the context of the norm of reasonable fitness that the concept of unseaworthiness must be considered; the test is not perfection. *Mitchell v. Trawler Racer, Inc.*, 362 US 539 (1960). On these facts, the finding of the District Court, that petitioner failed to prove by a preponderance of the evidence that respondent's vessel was unseaworthy, is entirely correct.

II

THERE IS NO CONFLICT OF DECISION

Petitioner cites *Waldron v. Moore-McCormack Lines, Inc.*, 386 US 724 (1967) and *Usner v. Luckenbach*, 397 US 933 (1971), in a futile attempt to point up a conflict between these cases and the decision of the Fifth Circuit in the present case. *Waldron* concerned an improvident order on the part of the ship's mate in assigning too few men to perform a designated task. Recovery was allowed on the basis of the negligent order. The decision of the Fifth Circuit in the instant case is concordant with *Waldron*; it held that the District Court did not err in concluding from the evidence that petitioner's election to go beneath the deck was his own decision and *was not ordered* by respondent's personnel or the stevedore (App. A of Petition, p. 2A). The decision of the Fifth Circuit is in harmony with *Usner* because, contrary to petitioner's assumption, there was no unsafe condition.

* This amendment was omitted in the petition.

III

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

It is suggested by petitioner that the traditional protection offered those to whom the warranty of seaworthiness is due, is in jeopardy; thus, petitioner contends, an important question of federal law hangs in the balance. The fact that petitioner disagrees with the lower courts' interpretation and analysis of the evidence, does not make an important federal question.

> "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 US 220, 227.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

CORNELIUS G. VAN DALEN

New Orleans

September , 1971

PROOF OF SERVICE

I, Cornelius G. Van Dalen, one of the attorneys for respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the day of September, 1971, I served three copies of the foregoing brief in opposition of respondent on Wendell DeBose by mailing the same in duly addressed envelopes, with first-class postage prepaid, to Clifton S. Carl, Esq., 1020 National Bank of Commerce Building, New Orleans 70112, counsel for petitioner, Wendell DeBose.

CORNELIUS G. VAN DALEN